STATE OF MICHIGAN

COURT OF APPEALS

In re Mary E. Reetz Trust Agreement.

MISTY REETZ and SKY REETZ,

Petitioners-Appellants,

v

JILL OLAND, trustee of the Mary E. Reetz Trust Agreement,

Respondent-Appellee.

UNPUBLISHED
February 21, 2003

No. 236976
Lapeer County Probate Court
LC No. 01-032503-TI

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Petitioners appeal as of right the probate court's order interpreting language from a trust agreement executed by their grandmother, Mary E. Reetz, who is deceased. We reverse.

The parties dispute the interpretation of a provision concerning distributions to Mary Reetz's grandchildren and, consequently, the amount that petitioners are entitled to receive under the trust agreement. The trust document provided in pertinent part as follows:

> The trustee shall convey free of trust the remainder of the trust estate in equal shares to . . . the Settlor's [Mary Reetz's] children per stirpes. **A grandchild's share, if any, shall be limited to two-thirds (2/3) of a full share.** The remaining one-third (1/3) shall be conveyed free of trust in equal shares to Settlor's surviving children. [Emphasis added.]

Petitioners' father predeceased Mary Reetz; therefore, petitioners, his children, are generally entitled to his "share." Petitioners contended that the highlighted language only reduces a share where one grandchild is going to receive his or her parent's full share. Respondent contended that the highlighted language reduces the parent's share by one-third, regardless of how many grandchildren are going to divide a particular share.

The probate court found that the trust document was both patently and latently ambiguous. The probate court further found that it was "overwhelmingly clear that the settlor

did not intend for any and all grandchildren to get a total of any more than two-thirds (2/3) of the deceased parent's share." Thus, the probate court limited petitioners' combined share to two-thirds of the portion that their father would have taken under the trust agreement.

Petitioners contend that the probate court clearly erred in concluding that the trust provision at issue was ambiguous. In *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992), we explained the probate court's role in construing trust provisions:

> The role of the probate court is to ascertain and give effect to the intent of the testator as derived from the language of the will. Where there is no ambiguity, that intention is to be gleaned from the four corners of the instrument. A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language. A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning. [Citations omitted.]

We will only reverse a probate court's findings on a showing of clear error. *Id.* at 328. A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Petitioners contend that the probate court erred in ruling that the trust provision was patently ambiguous. We agree. A patent ambiguity exists if, on the face of the trust**,** an uncertainty arises "from the use of defective, obscure or insensible language." *Woodworth, supra* at 327-328. Language is ambiguous if it is susceptible to two or more meanings. See *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491-492; 597 NW2d 411 (1999).

Here, the article "a" and the singular form "grandchild" each indicate one person. The use of these terms together reinforces the singular meaning; that is, no one grandchild will take more than two-thirds of a "full share." Thus, while not artfully drafted, the meaning of the trust provision can be determined without resort to extrinsic evidence.

Respondent contends that the two-thirds limitation contradicts the inherent equality provided by a per stirpes distribution because the amount a grandchild receives depends basically on whether he or she has any siblings. However, the general scheme, per the trust, is a per stirpes distribution: children of a deceased child take that deceased child's share, but no more than two-thirds of a child's share. So, if a deceased child has more than one child, none of the children equally dividing the deceased child's share would take more than two-thirds of a full share.[1] A per stirpes distribution only creates equal shares; it does not operate to balance the division of those shares. MCL 700.2718; 80 Am Jur 2d, Wills, § 1237, p 393.[2] Here, the

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[1] If a deceased child was survived by one child, only then would the third sentence of the trust provision come into play in order to distribute the remaining one-third of the deceased child's share.

[2] 2002 version.

settlor's intention is clear: no grandchild shall receive as much as a child (i.e., a full share); hence, the two-thirds limitation. Consequently, the trial court clearly erred in ruling that the trust provision was patently ambiguous.

Next, petitioners argue the trial court clearly erred in concluding that the trust provision was latently ambiguous. As noted above, a latent ambiguity exists where the language and its meaning are clear, but some extrinsic fact creates the possibility of more than one meaning. *Woodworth, supra* at 328. Where an ambiguity may exist, extrinsic evidence is admissible: (1) to prove the existence of ambiguity; (2) to indicate the parties' actual intent; and (3) to indicate the parties' actual intent as an aid in construction. *In re McPeak Estate*, 210 Mich App 410, 412-413; 534 NW2d 140 (1995).

The circumstances in this case do not create the possibility of more than one meaning for the disputed language. Neither respondent nor the drafting attorney offered clear evidence that Mary Reetz intended anything other than the singular meaning clearly expressed by the document's language. Also, the fact that none of Mary Reetz's children had only one child when she executed the document does not evidence a latent ambiguity because her son Bryan was childless and of child-bearing age.

In addition, we reject the trial court's conclusion that the apostrophe in "grandchild's" was inadvertently inserted or that Mary Reetz misinterpreted the word as a plural rather than a possessive. First, a scrivener's testimony about a drafting mistake cannot be considered in interpreting the trust document where no ambiguity exists on the face of the document. See *Burke v Central Trust Co*, 258 Mich 588, 592; 242 NW 760 (1932). Thus, even if the drafting attorney could conclusively say that the language failed to reflect Mary Reetz's intent, we could not contradict the language's clear meaning. Second, the likelihood that these mistakes occurred is dubious. The plural of "grandchild" is "grandchildren," not "grandchilds." Thus, removing the apostrophe from "grandchild's" would create a non-word, not a word with a different meaning. For this reason, Mary Reetz seems unlikely to have misinterpreted "a grandchild's" as plural, even if she heard the document recited rather than read it. Accordingly, the trial court clearly erred in construing the trust provision as latently ambiguous.

In the absence of any ambiguity, we must enforce the language's clear meaning. As discussed above, the two-thirds limitation only applies where a deceased child is survived by one child, specifically, a grandchild. Therefore, we conclude that the trial court clearly erred in interpreting the provision as applying to petitioners; instead, petitioners are each entitled to one-half of their father's full share.

Reversed.

/s/ William C. Whitbeck, C.J.
/s/ Richard Allen Griffin
/s/ Donald S. Owens